

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 224/2002

**IN THE MATTER of Section 125 of the
Jamaica Constitution**

AND

**IN THE MATTER of the Public Service
Regulations 1961**

BETWEEN	LACKSTON ROBINSON	PLAINTIFF
A N D	DAISY COKE	1ST DEFENDANT
A N D	MICHAEL FENNELL	2ND DEFENDANT
A N D	EDWIN JONES	3RD DEFENDANT
A N D	PAULINE FINDLAY	4TH DEFENDANT
A N D	GEORGE PHILLIP <i>(Members of the Public Service Commission)</i>	5TH DEFENDANT
A N D	THE ATTORNEY GENERAL	6th DEFENDANT

R.N.A. Henriques Q.C. instructed by Livingston Alexander & Levy for
Plaintiff

Dennis Morrison Q.C. and John Francis instructed by Dunn, Cox & Orrett
for 6th Defendant

Mrs. Nicole Foster-Pusey for the 1st – 5th Defendants

**Heard: September 30, October 1 & November 6, 7, 2002 and
January 24, 2003**

Harris, J

By an amended Originating Summons, the plaintiff seeks the determination of the following:-

- “1. Whether or not the Solicitor General has power to rotate officers in the Attorney General’s Department be they senior or junior to perform the functions of a higher office before making a recommendation to the Chief Personnel Officer under Section 18(2)(b) of the Public Service Regulations 1962.
2. The hierarchy of the offices in the Attorney General’s Department being the Attorney General, the Solicitor General and two Deputy Solicitors General one of which will become vacant whether or not it is the duty of the Solicitor General to recommend the most senior officer in the Department to the rank of Deputy Solicitor General pursuant to the Regulations aforesaid.
3. Whether it is lawful for the Chief Personnel Officer to ignore the provisions of the Constitution and the Public Service Regulations 1961 where there is a clear vacancy in a post by

appointing a person junior in rank to the Plaintiff without first making a determination as to whether the Plaintiff who at the material time was duly appointed to act in the said post is suitable to be appointed to the post aforesaid;

4. Whether it is lawful for the Chief Personnel Officer to remove the Plaintiff from his post of Acting Deputy Solicitor General where a clear vacancy exists in relation to the said post for reasons other than those related to performance or conduct; **in that –**

- (i) **There was no assessment of the Plaintiff's performance in the post as required by the Public Service Regulations 1961; and**
- (ii) **That the purported assessment was not disclosed to the Plaintiff in order that he may have the opportunity to respond thereto, and consequently was deprived of being heard concerning same in breach of the rules of natural justice.**

5. Whether the action of the Public Service Commission in reverting the Plaintiff to his substantive post with the

consequential reduction in salary and other benefits amount to deprivation of property without lawful authority within the meaning of Section 18 of the Constitution;

6. Whether it is lawful for the Chief Personnel Officer to revert the Plaintiff to his substantive post on grounds other than those prescribed in the Public Service Regulations 1961.
7. **The Plaintiff, having acted in the post for several months and there being a clear vacancy and having regard to the Public Service Regulations and established practice, had a legitimate expectation of being confirmed in the post, has the actions of the Chief Personnel Officer deprived the Plaintiff of the legitimate expectation of being confirmed.**

He also seeks the following reliefs:

A DECLARATION that –

“The Plaintiff **was entitled to** continue to occupy and hold the post of Acting Deputy Solicitor General **from the 1st day of December 2001** until a proper determination for the suitability of his appointment to the post be made in accordance with the Regulations aforesaid.”

AN ORDER that:-

- (1) **“That the proper assessment be made of the Plaintiffs performance and conduct in office and that** the matter be remitted to the Public Service Commission to review the Plaintiff’s suitability for appointment to the post of Deputy Solicitor General and in doing so take into account the provisions of Sections 17 and 18 of the Public Service Regulations 1961.
- (2) **That the Plaintiff be compensated for the loss of acting salary and emolument of such office since the 1st day of December 2001.”**

The question posed at paragraph 5 is not one which the Court is empowered to address under this Summons.

The Plaintiff is an Attorney-at-Law and has been assigned to the Attorney General’s Department since March 13, 1989. On his initial assignment there, he assumed duties in the capacity of an Acting Crown Counsel (JLG/LL111), to which post he was appointed on March 15, 1990.

On September 2, 1991 he was appointed to act as an Assistant Attorney General (JLG/LLIV) and was appointed to that post on August 1, 1993.

He had been recommended by the then Solicitor General Dr. Kenneth Rattray, Q.C., on each occasion during which he acted, he had done so continuously until his permanent appointment to the posts of Crown Counsel and Assistant Attorney General.

He was appointed a Divisional Director (LO5) with effect from February 20, 1999 on the recommendation of the Solicitor General and on November 15, 2000 he was recommended to act as the Deputy Solicitor General (LO6) in which post he acted from October 1, 2000 to November 30, 2001, following which, he reverted to his substantive post.

Dr. Rattray demitted office as Solicitor General in December 2000 and Mr. Michael Hylton, Q.C. assumed the position in February 2001.

On October 17, 2001 the Plaintiff was informed by the Solicitor General that Mr. Salmon would have been recommended to act in the position in which the plaintiff had been acting. On October 19, 2001 the Solicitor General wrote to the Chief Personnel Officer of the Services Commission recommending that Mr. Hugh Salmon, Divisional Director, (LO5) in the Attorney General's Department, who is junior to the Plaintiff, act as Deputy Solicitor General (LO6) for a period of six months effective from December 1, 2001. Approval was granted for Mr. Salmon to act in the post. The post became vacant on or about November 8, 2001.

The first issue which falls for determination is whether on a proper construction of the Public Service Regulations, in particular, Regulation 18 (2), the Solicitor General had the authority to recommend and the Chief Personnel Officer was empowered to appoint a junior officer to act in a post in which a senior officer in the department had been acting.

Mr. Henriques urged that the decision to revert the Plaintiff to his substantive post and appoint a junior officer to act in the position in which the Plaintiff had been acting for a year is contrary to Section 18 (2) of the Public Service Regulations.

The provisions of Section 18 (2) (a) and (b) of the Public Service Regulations 1961 are relevant and it is necessary that they be outlined:

“18 (2) Where an acting appointment falls to be made otherwise than a prelude to a substantive appointment, the officer appointed shall

(a) as a general rule be the senior officer in the

Ministry or Department eligible for such acting appointment.

(b) assume and discharge the duties and responsibilities of the post to which he is appointed to act.”

Section 18 (a) is grounded on the precept that, as a rule, where an acting appointment is required to be made, save and except as a prelude to a substantive appointment, the senior officer in the department should be appointed to act. This is not an inflexible rule. It does not impose a mandatory condition for a senior officer to be automatically appointed to act in a higher post. The rule may be displaced.

On October 19, 2001 the Solicitor General, in his letter addressed to the Chief Personnel Officer, stated as follows:-

“As you know, Mr. Lackston Robinson has been acting as Deputy Solicitor General, vice Mr. Patrick Robinson who is on pre-retirement leave.

It would be appropriate, in my view, that other persons be allowed an opportunity to act in that capacity before a decision is made as to who should be recommended in due course for appointment.

I therefore recommend that with effect from December 1, 2001, and for a period of six (6) months, Mr. Hugh Salmon act as Deputy Solicitor General. Mr. Lackston Robinson would therefore revert on December 1 to his substantive post as Senior Assistant Attorney General.”

In a memorandum also dated October 19, 2001 from the Solicitor General to the Plaintiff, the following, inter alia, was communicated to the Plaintiff:

“I am today writing to the Public Service Commission recommending that effective December 1, 2001 you cease acting as Deputy Solicitor General and revert to your substantive post, as discussed with you and with the

Executive Committee. I am doing so on the ground that I would wish to see how other persons perform in that role before making a recommendation as to who should be appointed to fill the post when it becomes vacant.”

The Solicitor General averred in paragraph 5 of his affidavit of May 7, 2002 that his communication of October 19, to the Chief Personnel Officer was with the intention of observing persons other than the Plaintiff act in the post. The extract from his memorandum to the Plaintiff in the foregoing paragraph, clearly supports his assertion. At the time he made the recommendation for Mr. Salmon to act, he had held the post of Solicitor General for a period of approximately eight months only. He had only seen the Plaintiff act in the post of Deputy Solicitor General. As head of the department and being new to the department, it would have been reasonable for him to have observed others perform the duties of the post. It is clear that the object of his recommendation for Mr. Salmon to act for a period of six months was to satisfy himself as to the suitability of the officer to be recommended for appointment to the position at the appropriate time.

The complaint of the Plaintiff under this ground relates to an acting appointment being made other than as a precursor to a substantive appointment. Section 18 (2) of the Public Service Regulations does not impose any obligation on the Solicitor General by prescribing any method to which he should resort in making recommendations to the Chief Personnel Officer with respect to acting appointments. The section does not in any way fetter his right as to how he makes his recommendation, or as to whom he recommends to act in the post. There is nothing in the Regulations which would operate as a bar to his making such recommendation as he had.

It is the Chief Personnel Officer who is clothed with the authority, by virtue of the powers vested in her under section 10 of the Schedule to the Delegation of Functions (Public Service) Order 1963, to make acting appointments in accordance with Section 18 (2) of the Public Service Regulations. The Chief Personnel Officer, being vested with the exclusive right to make acting appointments, may do so even in circumstances where no recommendations have been made by the Head of a Ministry or Department.

The second issue raises the question as to whether the Solicitor General is under a duty to recommend the most senior officer to be appointed to the post of Deputy Solicitor General.

There is no imposition of a duty by the Regulations on the Solicitor General as to the manner in which he makes a decision relating to his recommendation to the Public Service Commission, prior to the substantive appointment of an officer to a post. He must however, in making his recommendation, adhere to the principles laid down by the Regulations.

The provisions relating to cases of permanent appointments are enshrined in Section 17 of the Public Service Regulations which are set out hereunder:

“17. (1) From time to time as vacancies occur the Commission consider the

eligibility of all officers for promotion, and in respect of every such officer for promotion, and in respect of every such officer shall take into account not only his seniority, experience and educational qualifications but also his merit and ability.

(2) For promotion to a post involving work of a routine nature more weight may be given to seniority than where the work involves greater responsibility and initiative. Merit and ability shall be given more weight progressively as the work involves a higher degree of responsibility and initiative.

(3) In the performance of its functions under paragraphs (1) and (2), the Commission shall take into account as respects each officer -

- (a) his general fitness;
- (b) the position of his name on the seniority list;
- (c) his basic educational qualifications and any special qualifications;
- (d) any special course of training that he may have undergone (whether at the expense of the Government or otherwise);

- (e) markings and comments made in confidential reports by any Permanent Secretary or other senior officer under whom the officer worked during his service;
- (f) any letters of commendation in respect of any special work done by the officer;
- (g) the duties of which he has knowledge;
- (h) the duties of the post for which he is a candidate
- (i) any specific recommendation of the Permanent Secretary or Head of Department for filing the particular post;
- (j) any previous employment of his in the public service or otherwise;
- (k) any special reports for which the Commission may call.”

Section 17 (1) – (3) dictate the criteria necessary for promotion. On the recommendation of an officer for appointment, the Commission is required to take into account, inter alia, the officer’s seniority, experience, educational qualifications, merit and ability. It is clear that seniority is not the sole determinative factor in assessing an officer’s fitness for promotion. It is not the only criterion to which consideration is given. More weight is given to seniority where the work is of a routine nature than where the work requires great responsibility and initiative. However, greater weight is given to merit and ability where the job entails a greater degree of responsibility and initiative.

The Solicitor General, in making a recommendation to the Public Service Commission, in consideration of a permanent appointment, would be required to do so under Section 18 (1) of the Regulations which predicates that a recommendation precedes such an appointment and would be bound to take into account the principles laid down in Section 17. The position of Deputy Solicitor General ranks as a very senior position. It is third in the hierarchy of offices in the Department. It follows that, in the appointment of someone to the post of Deputy Solicitor General, more weight would be placed on merit and ability than seniority.

It would not be obligatory on the part of the Solicitor General to recommend the most senior person in his Department to the post. There is also a possibility that he could find that there is no suitable person in his Department to recommend and may so indicate to the Public Service Commission, in which event, the Public Service Commission would have an option to advertise the post if no suitable person could be found within the Public Service to fill the position. Such a course, the Commission would be at liberty to adopt by virtue of Section 16 of the Regulations.

The third question to be answered is whether it was lawful for the Chief Personnel Officer to appoint a junior officer to act in a clear vacancy without first determining the suitability of the Plaintiff to be appointed to the post, he being at the material time appointed to act in the post.

The issue here is whether, prior to Mr. Salmon's appointment to act, the correct procedure which ought to have been pursued, was that, the Plaintiff's suitability as Deputy Solicitor General, should have been considered. This presupposes that there is a duty on the Chief Personnel Officer to assess the Plaintiff's fitness to be appointed to the post of Deputy Solicitor General before making any alternative acting appointment.

Where it is proposed to make an acting appointment, the Regulations do not place any obligation on the Chief Personnel Officer, to determine the suitability of an officer for permanent appointment to a post before any other person can be appointed to act. For a determination to have been made as to the Plaintiff's suitability as Deputy Solicitor General before Mr. Salmon was made to act, would have been inappropriate and fundamentally unjust to the Plaintiff. Such action would be tantamount to the adoption of a procedure subjecting him to a performance appraisal while he acts, which could very well jeopardize his permanent appointment to the post.

The Chief Personnel Officer was not under any duty to have enquired into the Plaintiff's suitability for appointment to the substantive post before arriving at a decision to appoint someone else to act. There is nothing unlawful in the method adopted by the Chief Personnel Officer in granting approval for the acting appointment of a junior officer to the post.

The fourth question, which, is subsumed by question 6, is whether it was lawful for the Plaintiff to have been removed from the post of Deputy Solicitor General where a clear vacancy exists, except for reasons relating to

his performance or conduct, there being no adverse reports against him. He contends that he ought to have remained in the post, there being no assessment of his performance as required by the Public Service Regulations and that a purported assessment of his performance had not been disclosed to him, enabling him to respond thereto.

The position of Deputy Solicitor General is not one to which he is entitled as of right. This was not his substantive post. Although he was given the privilege to act in the post, there is nothing to show that he could not have been subsequently reverted. There are no provisions in the Public Service Regulations which relate to the reversion of an officer from the position which was occupied by him in an acting position.

There are no provisions in the Regulations, from which it can be established, expressly or implicitly, that he has a right to be appointed to the post. In light of Section 16 of the Regulations it is obvious that a situation may arise where other persons could be considered for the appointment. Further, the fact that a person may have acted satisfactorily and conducted himself satisfactorily does not necessarily denote that he is the most suitable officer to fill a vacant post. It is for the Head of the Department, the Chief Personnel Officer and the Public Service Commission in the interest of the Public Service to decide on the most suitable officer to assume the position, after the assessment of all prospective candidates for the post.

The complaint as to the absence of an evaluation of the Plaintiff's performance would only have been relevant if a recommendation was being made with a view to a substantive appointment to the post. The Chief Personnel Officer was under no duty to have considered the performance or conduct of the Plaintiff at the time when he was removed from acting in the post of Deputy Solicitor General.

The Plaintiff's assertion as to the non-disclosure to him of the purported Assessment of his performance as well as the deprivation of an opportunity to reply to the Assessment will be considered later, when I deal with the issue touching the principle of legitimate expectation. I must, however, declare at this stage that there are no requirements in the Public Service Regulations which place an onus on the Chief Personnel Officer to consider an assessment of the performance of the Plaintiff as a condition precedent to her appointing someone else to act in the post.

A further question to be answered is whether the Plaintiff, having acted for approximately one year in the post of Deputy Solicitor General, had been deprived of the legitimate expectation that he would have continued to act in that position and eventually permanently appointed thereto.

The doctrine of legitimate expectation essentially imposes a duty to act fairly. A legitimate expectation may arise as a result of an express representation, or an undertaking, or an established course of dealing, such as to make unfair for a public authority to seek to depart from the representation, undertaking or course of dealing without giving the affected person an opportunity to be heard.

A person is entitled to a fair hearing before a public body or public official makes any decision adverse to his interest. In *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation* (1926) AC 355 at page 364 Lord Birkenhead declared that it was

“a well established principle of law, that if a person or public body is entrusted by the legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers or duties. they cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties.”

But even where a person's legal rights have been defeated, if he has a legitimate or reasonable expectation of receiving a benefit or privilege, he may have a remedy. Consequently, legitimate expectations may extend beyond enforceable legal rights and may be inclusive of expectations which have some reasonable basis.

In the case of *C.C.S.U. v. Minister of Civil Service* 1984 3WLR 1174 at 1187 Lord Fraser of Tullybelton stated:-.

“But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Court will protect his expectation by Judicial Review as a matter of Public Law.”

He continued by saying:

“Legitimate, or reasonable, expectation may arise either from an expressed promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”

Mr. Henriques submitted that the Plaintiff, being a member of the Public Service, once he satisfies the criteria laid down in Section 18 (2) of the Regulations was entitled to be considered for appointment to the post in which he had been acting, as, there was nothing to displace the general rule. He further urged that the guiding criterion is seniority and a senior officer cannot be passed over without a cause or reason.

There is nothing in the provisions of Section 18 (2) of the Public Service Regulations which dictates that the Plaintiff would be entitled to be permanently appointed to the position of Deputy Solicitor General, because of his seniority in the Department. The Chief Personnel Officer, in paragraph 3 of her affidavit of May 8, 2001 averred that there is nothing unusual in the method of recommendation adopted by the Solicitor General, as it paves the path for the determination of the appropriate person, if any, from the Department who should be appointed eventually.

The Chief Personnel Officer, on receipt of the Solicitor General's memorandum of October 19, 2001 recommending Mr. Salmon's appointment to act, consulted with the Public Service Commission. Her consultation with the Public Service Commission touching the acting appointment, was absolutely unnecessary. She explained however, that she had done so due to the significance of the Attorney General's Chambers and the post concerned. She has the right to make an acting appointment without consulting anyone. Further, Section 18 (2) does not expressly or impliedly make any provisions relating to performance or conduct referable to the Plaintiff's suitability or unsuitability for the post in which he acted.

The Plaintiff contends that no Performance Evaluation Report had been submitted by the Solicitor General as required by the Public Service Regulations. Mr. Henriques submitted that before reversion of the Plaintiff

and a junior officer appointed to act over him there would have had to be an Assessment of his performance.

Several letters were exhibited to an Affidavit of the Plaintiff sworn on April 5, 2002, relating to his acting as well as his permanent appointments to various positions since his assignment to the Attorney General's Department.

In a letter dated March 7, 1990 from Dr. Rattray, the then Solicitor General, to the Chief Personnel Officer recommending the Plaintiff and other officers from the status of acting to permanent appointments to various posts, Performance Evaluation Reports in respect of each person were remitted. The Plaintiff was at the time, Clerk of the Courts acting as Crown Counsel and was recommended to be appointed to that post. A letter from Dr. Rattray to the Chief Personnel Officer dated July 26, 1993, recommending the Plaintiff, then a Crown Counsel, to be appointed Assistant Attorney General, a position in which he was acting, was also accompanied by a Performance Evaluation Report.

A letter dated September 11, 1991 from Dr. Rattray to the Chief Personnel Officer recommended that the Plaintiff acts as Assistant Attorney General. By a letter of November 15, 2000 the Plaintiff was recommended by Dr. Rattray to the Chief Personnel Officer to act as Deputy Solicitor General. None of these letters was accompanied by Performance Evaluation Reports. All responses from the Chief Personnel Officer conveyed approvals of the acting appointments.

It has been observed that a letter dated March 13, 1989 from the Chief Personnel Officer to the Solicitor General, the acting appointment of the Plaintiff as a Crown Counsel, was approved with effect from March 13, 1989, "until further orders." A letter bearing the date August 12, 2000 from the Chief Personnel Officer appointing the Plaintiff to act as Assistant Attorney General and letter of November 20, 2000 from the Chief Personnel Officer approving the recommendation of the Plaintiff to act as Deputy Solicitor General stipulated that each period of acting was from a specified period "until further orders."

The fact that the directive from the Chief Personnel Officer expressed that each period of acting commenced on a fixed date and continued until further ordered, clearly illustrates that the Chief Personnel Officer reserves

the right to determine the period during which an officer acts. It follows therefore, that the Chief Personnel Officer is empowered to terminate the period during which the officer acts if she so desires.

It is obvious that the practice adopted by the former Solicitor General to remit Performance Evaluation Reports only on submission of recommendations for permanent appointments and not with respect to recommendations for acting appointment was the one that had been followed by the present Solicitor General. Mr. Douglas Leys, in paragraph 12 of his affidavit of June 6, 2002 attests to the fact that Evaluation reports are submitted to the Public Service Commission when officers are to be permanently appointed. The Solicitor General was under no obligation to have furnished any Performance Evaluation Report on the Plaintiff; at the time recommendation was made for Mr. Salmon to act.

In any event, the fact that the Solicitor General had not submitted an Evaluation Report on the Plaintiff at the time he recommended Mr. Salmon's acting appointment, does not show that he had departed from any general practice of not submitting an Evaluation Report upon a recommendation for an acting appointment. There is no practice or procedure which would demonstrate that the Plaintiff would have been entitled to his performance being assessed as a prelude to his being reverted from acting in the capacity of Deputy Solicitor General.

It was also a submission of Mr. Henriques that the Plaintiff had a legitimate expectation that before any action can be taken to prejudice his appointment, or for him to be reverted to his substantive post, he would be entitled to a hearing in accordance with established practice and procedure in the public service and in accordance with the principles of natural justice.

The gravamen of this complaint is that the Plaintiff was not given an opportunity to be heard before he was reverted. Mr. Henriques stated that the Plaintiff expected that he would have had the opportunity to have commented on any adverse reports on his performance which had been sent off. In the memorandum dated October 19, 2002 which was sent by the Solicitor General to the Plaintiff, the Solicitor General brought to his attention a number of issues relating to his performance and attitude. This memorandum had been prepared as the Plaintiff had indicated that he desired to obtain legal advice, subsequent to his being informed that he would have been reverted. A copy of the document was however sent to the

Chief Personnel Officer by letter of October 30, 2001, upon her request to the Solicitor General, such request having been made by the Public Service Commission to the Chief Personnel Officer for an Evaluation Report on the Plaintiff.

This document submitted to the Chief Personnel Officer is not in a prescribed form agreed on by an Executive Committee in the Attorney General's Department. In July 2001, Mr. Douglas Leys was requested to prepare such a form but he failed to do so due to pressure of work. Such a form was not prepared until May 2002. Even if the agreed form were to be used, it would not have been available for use by the Solicitor General. There is however a prescribed form in use in the Public Service. The Solicitor General was not obliged to have submitted any Evaluation Report to the Chief Personnel Officer upon her request for same. But assuming the Solicitor General had completed and submitted the form prescribed by the Public Service, or a form which the Committee had revised and agreed, there is no duty on the Chief Personnel Officer to take note of it. There was no requirement for such a Report then.

The Plaintiff was privy to the contents of the document, as, it had been given to him by the Solicitor General on October 19, 2001 after he indicated that he proposed to seek legal advice. Even if this document were to be construed as an Assessment of his performance, he was well aware of its contents before it was submitted to the Chief Personnel Officer, yet he elected not to respond to it. His complaint that he was not given an opportunity to respond to it is devoid of merit.

Mr. Henriques cited a number of cases in support of his proposition that the defendants acted contrary to the principles of natural justice and the Plaintiff's legitimate expectation. I will now make reference to some of these cases.

Among the cases cited was *Reg v. Home Secretary, Ex ; Ruddock* 1978 1W.L.R. 1482, in which, C, a prominent member of the Campaign for Nuclear Disarmament learnt in 1985 from a Television broadcast that his telephone had been tapped. An Affidavit sworn in 1985 by a former Intelligence Officer disclosed that an application had been made for a warrant to monitor C's telephone calls and that the warrant had been issued in 1983 but had not been issued in accordance with the criteria for

interception of communication which had been published between 1952 and 1982.

C commenced proceedings in 1985 seeking a declaration that the Secretary of State had improperly intercepted his calls. The Secretary of State averred that it was an invariable practice to confirm or deny the existence of warrants for interception of communications and that a scrutiny of all applications for warrants issued, met the published criteria. Although C's application for a declaration was unsuccessful, it was held that he had a legitimate expectation that the criteria would be applicable in his case in view of the publication of the criteria for interception of communication between 1952 and 1982 and their regular application when authorization for interception was considered.

The case of *Reg. v. Liverpool Corporation, Exp. Taxi Fleet* (C.A.) 1972 Weekly Law Reports 1262 was also relied on by him. In that case, the Chairman of a sub committee of the Liverpool Corporation gave an undertaking that the number of licensed taxis, which were fixed at 300, would not be increased until a private bill passed by parliament had come into effect. The undertaking was orally confirmed by him and also in a letter under the hand of the Town Clerk, to two association representatives of holders of existing taxi licenses. Before the private bill was passed, the sub committee passed a resolution that the number of licenses should be increased. The association of license holders applied to the Courts for orders of prohibition and certiorari. The Divisional Court dismissed the application. The Court of Appeal granted an order of prohibition against the corporation granting any increase in licenses before first hearing representation, which may be made by and on behalf of interested persons, inclusive of the Applicants.

Reference was made by him to the case of *CC.S.U. v. Minister of the Civil Service* (supra) as well. In that case, the majority of the staff of the Government Communications Headquarters were members of Trade Unions, as, they were allowed to do so. Although there was an established practice for consultation between trade unions and the official sides with respect to any important changes in terms of service of the staff, the Minister of the Civil Service, without consulting the staff or the trade unions, issued instructions, prohibiting the staff from being members of national trade unions. A trade union and six members of staff sought judicial review of the Minister's instructions. It was held, inter alia, that apart from national

security concerns, the Applicants would have a legitimate expectation that before the Minister issued the instructions for the variation of terms of conditions of the staff, she would have consulted the trade unions or the staff and that the failure to consult them would render the decision making process unfair.

The dominant and compelling feature of the foregoing cases, as well as all others cited, is that a legitimate expectation must have its genesis in some form of undertaking, representation or established course of dealing. None of the foregoing cases favour the proposition that the Plaintiff had a legitimate expectation that he would have continued to act as Deputy Solicitor General, or, that he would have been appointed to the post, based on any representation made, undertaking granted or course of dealing between himself and the public authorities.

He has not demonstrated that the Solicitor General, or the Chief Personnel Officer, or the Public Service Commission issued any statements, made any promises, given any guarantees to him, or dealt with him in such a manner to influence him in maintaining that he would not have returned to his post. When he was appointed to act, he acted vice Mr. Patrick Robinson who had been on pre-retirement leave and in place of Mr. Lennox Campbell who had been appointed to act in the post vice Mr. Robinson. Mr. Campbell was at the time acting as a Judge of the Supreme Court. There was a distinct possibility that after the Plaintiff began acting, Mr. Campbell could have ceased acting as a Judge, returned to act in the post and eventually permanently appointed thereto.

Notwithstanding the foregoing, it is necessary for me to make special reference to the case of *Rajkumar v. Lalla and Ors*, Privy Council Appeal No. 1 of 2001, which was also cited. In that case, the appellant was appointed night watchman in the prison service of Trinidad and Tobago, on February 26, 1968. He was appointed Prison Officer 1 on October 1, 1968 and confirmed in the post on October 1, 1970. He acted as Prison Officer 11 from February 1980 until April 1990 and from August 5, 1997 to the year 2001.

He passed the promotion examination for post of Prison Officer 11. He applied to take the promotion examination as an Assistant Superintendent of Prisons but received exemption from so doing because of his qualifications. He was interviewed for the post of Prison Officer 11 and

Supervisor of Prisons in 1984. He was also interviewed for the post of Prison Officer 11 in 1985, 1989 and 1994 but was never promoted. When his acting appointment as Prison Officer 11 was terminated in 1990 no reasons were given for it. The appellant wrote several letters complaining of his treatment. A response to one of his letters from the Director of Personnel Administration of the Services Commission Department stated that the Public Service Commission was satisfied that he had not been passed over for promotion, he had obtained a place in the 1995 Order of Merit list and consideration would be given to his claim along with other eligible officers when subsequent promotions were made. In 1998 while the Appellant was acting as Prison Officer 11, three sets of promotions to Prison Officer 11 were made. He was excluded.

Their Lordships ruled that the appellant's case should be remitted to the Service Commission to review his application for promotion, taking into account the length of time he served in the position without complaint or adverse comments as well as matters contained in Section 172 of the Public Service Commission Regulations [this sections outlines the criteria to be considered for promotion] and decide whether the Appellant's acting position should be upgraded to the substantive position and if the Commission decided not to promote the Appellant they should give their reasons for so doing.

The case of *Rajkumar v. Lalla & Ors* (supra) is distinguishable from the present case, in that the Appellant had acted in the position as Prison Officer 11 for over 14 years and his promotion was due to be considered. He was given the assurance that he would not have been passed over for promotion. It is clear that he would have had a legitimate expectation that by their letter of May, 1998 the Authorities, having promised that he would be considered for promotion, would have done so. He also would have had a legitimate expectation that staff reports would have been prepared for him subsequent to 1994, the Regulations having decreed the requirement of staff reports for decisions relative to promotions, the Commission would have taken into account all matters promulgated by the Regulations including the staff report evaluating his performance and consequently that he would have been promoted.

The Plaintiff in the case under review had not been considered for promotion. He had only acted in the post of Deputy Solicitor General for a year. At the time he commenced acting, there is nothing to illustrate that he

was being considered for promotion. Therefore, he could not have reasonably expected that he would have been appointed to the post, or for that matter to have continued acting therein. There was no promise made, or undertaking given, or representation made to him orally or in writing by the Solicitor General, or the Chief Personnel Officer, or the Public Service Commission that he would have been considered for confirmation in the post, which, consequently, would have given rise to a legitimate or reasonable expectation on his part that this would have materialized.

There is nothing to establish that the defendants made any representations or had given any undertaking which could have persuaded the Plaintiff to believe that having been recommended to act, he would have remained acting in the post of Deputy Solicitor General. There is no evidence to demonstrate that, once he acted in the position, he could not be reverted to his substantive post, or that he would have been appointed to the post of Deputy Solicitor General.

The Public Service Regulations do not preclude the Solicitor General from making recommendations for a junior officer to be appointed to act in a higher post, be it vacant or not. The Public Service Commission has not reached the stage of considering a permanent appointment to the post of Deputy Solicitor General. On a proper construction of the Public Service Regulations 1961 and the Delegation of Functions (Public Service Order) 1963, it cannot be recognized that the Chief Personnel Officer had erred when she removed the Plaintiff and appointed someone else to act in the post of Deputy Solicitor General, or, that the Solicitor General had erred when he proposed that the Plaintiff be reverted and that Mr. Salmon act in the post. There is nothing which could establish a course of dealing between the Plaintiff and the defendants which would give rise to a legitimate or reasonable expectation that the Plaintiff would have been appointed permanently to the post. The doctrine of legitimate expectation therefore, cannot enure to his benefit.

The Plaintiff is not entitled to the declaration or the orders sought. There is no authority which permits this Court to grant a declaratory relief that the Plaintiff is entitled to continue to occupy the post of Acting Deputy Solicitor General. This Court is not at liberty to make an order that the matter be remitted to the Public Service Commission for its consideration of his suitability for appointment to the post of Deputy Solicitor General. The

